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William A. Falik

Anna C. Shimko

The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California

by
WILLIAM A. FALIK*
and ANNA C. SHIMKO**

During the month of June 1987, the United States Supreme Court announced two of its most significant land use decisions of the last fifty years. The Court's rulings in *First English Evangelical Lutheran Church v. County of Los Angeles*[1] and *Nollan v. California Coastal Commission*[2] tipped the scales toward the side of property owners in the endless struggle between the state's power to freely regulate land use in order to benefit the health, safety, and welfare of the general public and the power of private landowners to make productive use of their lands in whatever manner they see fit. Although the Court has clearly chosen a new direction, considerable uncertainty exists over how these landmark cases will be applied to future land-use planning decisions. For this reason, the history, holdings, and implications of these two cases deserve careful consideration.

I. The *First English* Decision

A. Highlights of the Decision

In the *First English* case, the Court determined, in a six to three decision, that when a land-use regulation is judicially invalidated and thereafter abandoned by the legislative agency, the United States Constitution demands that the government pay compensation to the landowner

* Partner, Freytag, LaForce, Teofan & Falik, San Francisco, California. A.B. 1968, Cornell University; J.D. 1971, Harvard Law School.
** Associate, Freytag, LaForce, Teofan & Falik, San Francisco, California. B.A. 1983, University of California at Davis; J.D. 1986, Cornell University.

1. 107 S. Ct. 2378 (1987).
2. 107 S. Ct. 3141 (1987).

for the temporary "taking" of his property.[3] The Court avoided making such a pronouncement regarding "temporary" regulatory takings in similar cases for almost the entire last decade.[4] Curiously, the Supreme Court chose to announce this policy in a case involving an ordinance of a type that is typically upheld on the basis of the state's authority to enact safety regulations through the traditional exercise of the police power.[5]

In *First English,* a church in Los Angeles County had developed a retreat center and a recreational area for handicapped children on its twenty-one acre parcel of property.[6] In 1978, storm runoff caused the creek flowing through the property to overflow, thereby flooding the land and destroying the buildings.[7] In 1979, Los Angeles County responded with action that appeared to be a traditional exercise of its police power prerogative—enacting an interim ordinance[8] which prohibited development in this flood protection area.[9]

The church filed a complaint against the county alleging that the ordinance prohibited all use of its property and that it should receive just compensation for its loss.[10] Both the California Superior Court and the Court of Appeal rejected the church's cause of action, feeling obligated to follow the California Supreme Court's decision in *Agins v. City of Tiburon.*[11] In *Agins,* the California Supreme Court held that a landowner may not maintain an inverse condemnation suit for damages based upon a regulatory taking, but may only seek invalidation of the offensive regulation so that it would not burden the property in the future.[12]

3. *First English,* 107 S. Ct. at 2389.

4. *See, e.g.,* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

5. *See, e.g.,* Mugler v. Kansas, 123 U.S. 623, 668 (1887) ("A prohibition simply upon the use of property for purposes that are declared . . . to be injurious to the health, morals, or safety of the community, cannot . . . be deemed a taking . . . ."); *see also* Goldblatt v. Hempstead, 369 U.S. 590, 592-93 (1961) ("If [an] ordinance is otherwise a valid exercise of . . . police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.").

6. *First English,* 107 S. Ct. at 2381.

7. *Id.*

8. This ordinance subsequently became permanent, but this did not affect the Court's decision. *Id.* at 2384 n.7.

9. *Id.* at 2381.

10. *Id.* at 2382.

11. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds.* 447 U.S. 255 (1980).

12. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375 (a permanent scenic zoning measure was at issue in *Agins* and prohibited the construction of dwellings designed to house two or more families).

The United States Supreme Court in *First English,* however, accepted without consideration the church's allegation that the ordinance denied the church all use of its property,[13] thereby sidestepping the threshold takings issue. The Court ruled that if the ordinance is invalidated on remand to the California courts, the property owner is entitled, by virtue of the takings provisions of the United States Constitution's fifth amendment[14] (as incorporated in the fourteenth amendment[15]), to monetary damages for the deprivation suffered during the period between enactment and invalidation of the ordinance.[16] The Court observed that when property is subject to an unconstitutionally excessive regulation, such property has been "taken" by the government and the property owner is entitled to compensation.[17] The Court determined that excessive regulation of property—even for the period of time that it takes to have the ordinance invalidated by a court—effects a taking, albeit "temporary" in nature, which is worthy of a compensatory remedy.[18]

B. Unresolved Issues

(1) What is a Regulatory Taking?

Unfortunately, as is frequently the case with landmark decisions, *First English* raises more questions than it answers. For instance, the case does not clearly define what constitutes an unconstitutional regulatory "taking." The question remains whether to establish a compensable regulatory taking a landowner must prove only that the burdensome regulation precluded him from using his property, or whether, in addition, he must also establish that the enactment of the regulation extended beyond the government's legitimate exercise of its police power.

The *First English* opinion contains seemingly contradictory language on this issue. Initially, the Court implies that evidence of *both* of these factors is necessary to establish a compensable regulatory taking. Because the Court's decision was based on the adequacy of the church's

13. *First English,* 107 S. Ct. at 2389.

14. The fifth amendment provides that "[n]o person shall be . . . deprived of . . . property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

15. The fifth amendment was made applicable to the states through the fourteenth amendment in Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

16. *First English,* 107 S. Ct. at 2389.

17. *Id.* at 2386.

18. *Id.* at 2388 (" 'temporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation").

complaint as a matter of law and not as a resolution of the facts in the case, the Court cautioned:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. These questions, of course, remain open for decision on the remand we direct today.[19]

Conversely, near the end of the decision, the Court states, "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[20]

The threshold issue, then, becomes what requirements must be met to establish a taking. Although the Court in *Agins v. City of Tiburon*[21] held that the city's zoning ordinances did not effect a taking of property without just compensation,[22] the Court noted that "the application of a general zoning law to particular property effects a taking if (1) the ordinance does not substantially advance legitimate state interests, or (2) denies an owner economically viable use of his land."[23] The Supreme Court in *Agins* plainly indicated that only one of these two prongs must be satisfied to establish a regulatory taking. Therefore, deprivation of use alone, through the enactment of an intrusive land-use ordinance, could constitute a taking. Certainly, a taking test requiring proof of only one of the *Agins* prongs would simplify the analysis and increase the probability of recovery of damages by property owners made possible by *First English.*

Recently, the *Agins* two-pronged takings test was used by the Supreme Court to test the validity of a land-use regulation, giving further credence to the theory that only one of these prongs must be proved to establish a compensable regulatory taking. In the case of *Keystone Bituminous Coal Association v. DeBenedictis,*[24] decided in March 1987, the Court considered the constitutionality of Pennsylvania's Subsidence Act.[25] The Court ultimately found that the petitioners had not success-

19. *Id.* at 2384-85 (citations omitted).
20. *Id.* at 2389.
21. 447 U.S. 255 (1980).
22. *Id.* at 262-63.
23. *Id.* at 260 (citations omitted).
24. 107 S. Ct. 1232 (1987).
25. This law, quite similar to the statute struck down by the Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), prohibits coal mining that will cause subsidence damage to public buildings, dwellings, and cemeteries and requires that up to approximately 50% of the

fully established the existence of either of the *Agins* factors and that the regulation, therefore, did not effect a taking.[26] However, it is certainly significant that the *Agins* test was applied in *Keystone* and that the Court stated that a "statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.' "[27]

If Supreme Court policy is construed as mandating that deprivation of all economic use, standing alone, constitutes a compensable taking (even if the subject regulation substantially advances legitimate state interests and is therefore a reasonable exercise of police power), the practical ramifications will be enormous. A requirement that local agencies compensate property owners whenever legitimate health and safety regulations preclude landowners from using their property would, undoubtedly, constitute a substantial financial burden to local government entities. Although it may seem that fairness and justice would be served by compensating property owners for the private loss that they suffer in order to benefit the general public welfare, it would be surprising if the state's exercise of its legitimate constitutional powers was to be so effectively circumscribed by a broad reimbursement requirement. This is true particularly in such times of dwindling government coffers. That type of justice and fairness, however, may be precisely what the *First English* Court envisions as a result of its decision. Clearly, as Justice Stevens noted in his dissenting opinion in *First English,* future litigation will determine how broadly the *First English* compensation mandate is applied.[28] Perhaps, if the pendulum swings in another direction, a creative court might attempt to balance the benefits and burdens in a different manner and private property owners may someday be required to recom-

coal beneath these structures be kept intact. The petitioners brought a takings claim, contending that the Act interfered with their property right to extract coal and to erect facilities on the surface. *Keystone,* 107 S. Ct. at 1237-39.

26. *Id.* at 1242.

27. *Id.* at 1247 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-96 (1981) (citation omitted)). Query whether, after *First English,* the investment-backed expectations test is dead. In numerous instances, the Court has stated that regulations which unduly interfere with a property owner's reasonable, investment-backed expectations or that prevent economically viable use of land may be unconstitutional. *See, e.g.,* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 125 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978). The Court in *First English* does not mention this standard and only discusses a prohibition of all use of property. This may, however, and probably should, in light of Court precedent, be interpreted to mean "all reasonable and economically viable" use of property.

28. *First English,* 107 S. Ct. at 2389-90 (Stevens, J., dissenting).

pense the government for actions taken which enhance the value of private property.

Justice Stevens maintains that "some sort of improper purpose or insufficient justification" must be alleged in order to properly challenge the constitutionality of an ordinance.[29] Justice Stevens attempts to limit the application of the majority opinion to instances in which *both* prongs of the *Agins* test are met. Stevens argues that the Court "does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the County's effort to preserve life and property could ever constitute a taking."[30] In particular, Stevens referred to the traditional nuisance exception to the takings doctrine, established in such cases as *Hadacheck v. City of Los Angeles*[31] and *Mugler v. Kansas,*[32] whereby a health and safety regulation cannot constitute a taking because all individuals hold property under an implied obligation to refrain from injurious or noxious uses of their property.[33] The three dissenting members of the Court clearly feel that there can never be a taking without an improper and arbitrary exercise of the police power by the rule-promulgating agency. The majority opinion, however, does not clearly resolve this crucial issue; property owners and governmental bodies must await future clarification of the Court's analysis to determine in what circumstances apparently legitimate exercises of the police power will give rise to compensation.

(2) How Will Damages Be Measured?

Another issue left for future resolution concerns the manner in which damages will be calculated once a court finds that a temporary taking has occurred. The Court states that "invalidation of [an] ordinance without payment of fair value for the use of the property" during the lifetime of the ordinance would be constitutionally insufficient.[34] The Court does not indicate, however, the method by which "fair value" should be calculated. In the past, courts have calculated "fair value" on the basis of a fair rental value for the property,[35] interest on the prop-

29. *Id.* at 2392 (Stevens, J., dissenting).
30. *Id.* at 2393 (Stevens, J., dissenting).
31. 239 U.S. 394 (1915) (emissions from brickyard).
32. 123 U.S. 623 (1887) (intoxicating liquors).
33. *First English,* 107 S. Ct. at 2391 (Stevens, J., dissenting).
34. *Id.* at 2389.
35. Generally, the measure of damages for temporary physical takings of property is computed on the basis of the property's fair rental value during the period of the taking. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); *see also* Klopping v. City of Whittier, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1356, 104 Cal. Rptr. 1, 11-12

erty's market value,[36] (these two methods perhaps most logically construe the Court's words), diminution in the property's value over the subject time period,[37] actual damages suffered due to the deprivation of use,[38] and other measures of damages. Ordinarily, the market value of property dictates the level of compensation for a permanent taking.[39] Naturally, property's market value is dependent upon the actual use and potential use of the property. In cases likely to give rise to temporary taking damages, the permissible use of property and, therefore, the property's market value, may be unclear at the time a court awards damages. Hence, a damage valuation based on a traditional market value theory could prove difficult to apply. The method ultimately used to calculate damages for temporary takings may, in large part, determine the magnitude of the practical effects of *First English.*[40]

(1972) (property owner awarded loss of rental income attributable to city's unreasonable precondemnation publicity); People *ex rel.* Dep't of Pub. Works v. Dunn, 46 Cal. 2d 639, 641, 297 P.2d 964, 966 (1956) (rental income is a proper element to consider in ascertaining market value of condemned property).

36. In Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985), one of the few cases prior to *First English* in which true regulatory-taking damages were awarded, the Eighth Circuit utilized an interest rate factor to calculate damages. Nemmers' land, which had been zoned "light industrial," was annexed to the City of Dubuque and rezoned "residential." The Court determined that Nemmers possessed a vested right in the light industrial zone status of the land and should receive just compensation for the city's abrogation of that right. The parties agreed that the appropriate measure of compensation was the interest (at the rate of 15%) that would have accrued on the difference between the fair market values of the property under the proper (light industrial) and improper (residential) zoning classifications over the three and a half year period during which the property was wrongly classified. *Id.* at 505. Note that the usefulness of such an interest-based formula for calculating regulatory-taking damages may be limited to situations where the constitutionally appropriate designation for the subject property is reasonably identifiable and its effects quantifiable. *See infra* note 40.

37. The use of the diminution in value concept to measure taking damages would constitute a departure from previous case law. *E.g., Kimball Laundry,* 338 U.S. at 7 (diminution in property's value over the time of a temporary taking is considered an improper measure of damages).

38. Traditionally, lost profits have not been considered by courts awarding damages for the taking of property. *See, e.g.,* United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 281-82 (1943); *Dunn,* 46 Cal. 2d at 641, 297 P.2d at 966.

39. *See, e.g.,* CAL. CIV. PROC. CODE § 1263.310 (West 1982) (the measure of compensation which shall be awarded for property taken is fair market value); *see also id.* § 1263.320 (West 1982) (fair market value is the highest price to which a seller and buyer, acting with no particular urgency, would agree).

40. *First English* may serve as the springboard for further judicial attention to and activity in the area of takings damage compensation. Although it has been quipped by some that the Court's decisions in *First English* and *Nollan* were the "Lawyer's Full Employment Act of 1987," the same might be said of those decisions' effect on appraisers, real estate experts, and land-use specialists (some of whom may also be lawyers), whose opinions could prove crucial in determining damages to be awarded to property owners who have suffered temporary regulatory takings. Such experts are necessary because taking damages need not be based solely upon the subject property's current and governmentally sanctioned use. *See id.* § 1263.320

C. Legal Background Leading to *First English*

In order to fully grasp the importance and the potential implications of *First English,* it is important to consider the context in which the Supreme Court considered this temporary taking case. More than sixty years ago, the Court in *Pennsylvania Coal Co. v. Mahon*[41] concluded that overly restrictive land-use regulations could be unconstitutional. Justice Holmes, writing for the majority, stated that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[42] In the intervening years

(West 1982). For instance, a property owner may be able to obtain enhancement damages if the owner can prove that his property's market value is actually higher than the value of its current use due to projected market needs or the effects of a nearby project that would enhance the property's value. *See, e.g.,* People *ex rel.* Dep't of Water Resources v. Andresen, 193 Cal. App. 3d 1144, 1153-56, 238 Cal. Rptr. 826, 832-34 (1987) (property owner entitled to damages based on reasonable expectation that the state would, in the future, purchase granite from property's then dormant quarry for repairs to nearby state dams); Merced Irrigation Dist. v. Woolstenhulme, 4 Cal. 3d 478, 495, 483 P.2d 1, 12, 93 Cal. Rptr. 833, 844 (1971) (condemnee must be compensated for increase in land value due to anticipation of the benefits of a proposed improvement, as long as condemnee's property was not expected to be taken as part of the improvement).

Similarly, property's compensable market value may reflect a consideration of all the uses to which the property may be readily converted and for which it is available. People *ex rel.* Dep't of Pub. Works v. Flintkote, 264 Cal. App. 2d 97, 102, 70 Cal. Rptr. 27, 30 (1968) ("In this connection, the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as the measure of value, but to the extent that the prospect of such uses affects the market value of the land; however, elements affecting value which, while possible, are not reasonably probable, should be excluded."); United States v. Powelson, 319 U.S. 266, 275 (1943) ("In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels . . . . But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future.").

If an aggrieved property owner is able to demonstrate, with reasonable certainty, how his property is likely to be zoned after a court invalidates a regulation applicable to the property, the property's permitted uses under the probable zoning classification can be taken into account in establishing appropriate temporary regulatory taking damages. *See* City of Los Angeles v. Decker, 18 Cal. 3d 860, 867, 558 P.2d 545, 549, 135 Cal. Rptr. 647, 651 (1977) ("[T]he condemnee is entitled to show a reasonable probability of a zoning change in the near future and thus to establish . . . the highest and best use of the property . . . ."); *Dunn,* 46 Cal. 2d at 642, 297 P.2d at 966 (admitted evidence of probable future zoning change).

Furthermore, where a court has ruled that a land use regulation is constitutionally impermissible, the limited (if any) uses permitted under the invalid ordinance cannot be used as evidence of the property's market value for calculation of damages. *See* People *ex rel.* State Pub. Works Bd. v. Talleur, 79 Cal. App. 3d 690, 696, 145 Cal. Rptr. 150, 152 (1978) ("[W]here the land use regulation is unconstitutional, either because it is unrelated to a permissible governmental objective and aimed solely at depressing land values or where the regulation has some other constitutional infirmity, it is not admissible evidence of value.").

41. 260 U.S. 393 (1922).

42. *Id.* at 415. The Court held that a Pennsylvania statute prohibiting the mining of

between *Pennsylvania Coal* and *First English,* the Court has never retracted its statement that a government regulation could constitute a taking of property; in fact, this principle was consistently applied in cases subsequent to *Pennsylvania Coal.*[43] However, as Justice Holmes also stated in *Pennsylvania Coal,* "government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[44] It is this dynamic tension between legitimate exercises of the police power and governmental action that "goes too far" that spawned the *First English* and *Nollan* decisions.

In addition to recognizing regulatory takings, the Court also has consistently awarded monetary damages to landowners whose property has been physically invaded by the government on a temporary basis. In *United States v. Causby,*[45] the Court ruled that a landowner should be compensated for an easement taken by the government due to frequent flights of military airplanes over his land at low altitudes.[46] The Court ruled that the invasion was a taking violative of the fifth amendment whether it was on a permanent or temporary basis.[47] Also, when the government appropriated private property for its use during World War II, property owners were compensated for the government's temporary physical interference with the use of their property.[48]

The Court, therefore, had consistently concluded that when governmental action physically intruded upon a landowner's use of property, even temporarily, such action could be deemed to be a taking in inverse condemnation,[49] as contrasted to direct takings whereby the governmen-

certain coal in a way that weakens the land supporting dwellings amounted to an unconstitutional taking because it "destroy[ed] previously existing rights of property . . . ." *Id.* at 412-14.

43. *E.g.,* Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) ("Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation . . . as to amount to a taking under the logic of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).").

44. *Pennsylvania Coal,* 260 U.S. at 413.

45. 328 U.S. 256 (1946).

46. *Id.* at 260-61.

47. *Id.* at 268. Indeed, the Court did not decide whether the taking was permanent or temporary; rather, it remanded the case to the Court of Claims to decide that issue in order to determine the proper amount of compensation due to the property owner.

48. *See, e.g.,* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

49. Inverse condemnation is a cause of action against a government agency to recover the value of property taken by the agency though no formal exercise of the power of eminent domain has been completed. BLACK'S LAW DICTIONARY 740 (5th ed. 1979); *see, e.g.,* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986).

tal body commences eminent domain proceedings and voluntarily pays for the property. In contrast to the physical taking type of cases in which a clear line of decision had been established, regulatory takings for overly burdensome land-use regulations remained in a quagmire of legal uncertainty. *First English* finally clarifies that a temporary taking, which is accomplished through regulatory rather than physical means, must be monetarily compensated.

Although this link between concepts seems a logical step for the Court to take, the Supreme Court has studiously avoided making a clear pronouncement that regulatory takings require compensation in similar cases for almost the last decade. In *Agins*, the California Supreme Court considered a zoning ordinance substantially limiting the number of dwelling units that could be built on the plaintiff's land. The court determined that a landowner who alleges that an ordinance has worked a deprivation of substantially all use of its land may attempt, through declaratory relief or writ of mandamus, to invalidate the ordinance as a constitutionally excessive regulation, but may not "elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid."[50] On appeal the United States Supreme Court held that the zoning ordinance, on its face, did not take the appellant's property without just compensation because it neither prevented the best use of appellant's land nor extinguished a fundamental attribute of ownership.[51] Since the property owner might be permitted to build as many as five homes on its five-acre parcel of land, the Court felt that fifth amendment "justice and fairness" were satisfied.[52] Moreover, in ruling that no taking had occurred, the Court found it unnecessary to consider whether the remedies available for a regulatory taking could be limited to nonmonetary compensation.[53]

Since the Court did not disturb the ruling of the California Supreme Court relative to the proper remedy for a regulatory taking, the California *Agins* ruling on the compensation issue has bound California courts (and, conversely, "liberated" California planning authorities) for the last eight years. Only now, through the *First English* decision, has a majority of the Supreme Court supplied new direction by clarifying its policy on this significant issue. In *First English,* the Court discussed the *Agins*

50. Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), 447 U.S. 255 (1980), *aff'd,* 447 U.S. 255 (1980).

51. Agins v. City of Tiburon, 447 U.S. 255, 262 (1980).

52. *Id.* at 262-63.

53. *Id.* at 263.

holding, commenting that, "[w]hile the Supreme Court of California may not have actually disavowed this general rule [requiring compensation for regulatory takings] in *Agins,* we believe that it has truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation."[54] In light of the supremacy of the Supreme Court's interpretation of the federal constitution's mandates in this area, California courts recognize that the California Supreme Court's *Agins* holding on the compensation for regulatory takings issue has been superseded by *First English.*

In at least three cases since *Agins,* the United States Supreme Court had been presented with the opportunity to consider whether temporary regulatory takings are compensable.[55] The Court chose, however, to sidestep and carefully avoid reaching the compensation issue, even when certiorari had been granted presumably for the sole purpose of deciding the issue. In *San Diego Gas & Electric Co. v. City of San Diego,*[56] a property owner challenged a change in the zoning designation of its land from a partially industrial, partially agricultural "holding" zone to open-space land.[57] A California Superior Court jury had awarded the property owner $3,000,000 in damages for this taking of its land.[58] The California Court of Appeal, in considering the case for a second time,[59] reversed the superior court because it felt that *Agins* was dispositive on the issue of disallowing damages for a regulatory taking.[60] The court of appeal also declined to consider the constitutional validity of San Diego's open-space plan, preferring to permit the property owner to retry the case in superior court on that issue.[61] The United States Supreme Court ultimately dismissed the appeal due to the absence of any determination as to whether

54. *First English,* 107 S. Ct. at 2387.

55. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2563 (1986) (appellant had sought damages in an inverse condemnation proceeding for the denial of its residential subdivision plan); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 175 (1985) (respondent sought compensation when the local planning commission did not approve respondent's development proposal); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 626 (1981) (appellant sought damages for inverse condemnation due to the city's rezoning of its land for open space).

56. 450 U.S. 621 (1981).

57. *Id.* at 624-25.

58. *Id.* at 627.

59. Initially, the California Court of Appeal denied the city's petition for rehearing, but the California Supreme Court subsequently granted the city's petition. The California Supreme Court, however, then transferred the case back to the court of appeal, directing it to reconsider the case under *Agins. Id.* at 628.

60. *Id.* at 629.

61. *Id.* at 630.

there had been a taking.[62] The issue of available remedies for a regulatory taking was, therefore, not reached, since the case was found not ripe for the Supreme Court's determination. The makings of a majority decision favoring temporary taking compensation was beginning, however, to take form.

One of the most noteworthy aspects of *San Diego Gas & Electric* was Justice Brennan's lengthy dissent, in which he traced Supreme Court precedent and concluded that the United States Constitution dictates that a regulatory taking must be monetarily compensated. Justice Brennan stated that the California Supreme Court in *Agins* had mischaracterized Court precedent concerning regulatory takings and he proposed the rule which the majority of the Court ultimately embraced in *First English*.[63]

Justice Rehnquist concurred in the majority decision in *San Diego Gas & Electric* that the Court could not decide the case on the merits due to the lack of a final judgment from the California courts. Justice Rehnquist noted that if there had been a final state court judgment in the case, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan."[64] Rehnquist's concurring opinion, together with Brennan's dissent, were harbingers of *First English;* members of the Court were beginning to form a consensus with regard to the constitutional necessity to compensate temporary regulatory takings in the proper case.

The budding *First English* majority, however, was not quick to coalesce. In 1985, the Supreme Court again refused to consider a case which raised the regulatory-taking compensation issue. The Court concluded that the case was unripe because the property owner had neither sought variances allowing it to develop the property after its plan was rejected by the planning authority nor had the landowner utilized the proper procedures for obtaining just compensation prior to initiating suit.[65]

Most recently, in *MacDonald, Sommer & Frates v. Yolo County,*[66] the property owner claimed that the county had appropriated the entire economic use of its property in order to provide a public open-space buffer. The Court failed to reach the compensation issue by holding that

62. *Id.* at 629-33.

63. *Id.* at 653 (Brennan, J., dissenting). Curiously, although Justice Brennan reaffirms his position in *San Diego Gas & Electric* by joining the majority in *First English,* he regarded the majority decision in *Nollan* as having gone too far. He authored a scathing dissent in that case.

64. *Id.* at 633-34 (Rehnquist, C.J., concurring).

65. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

66. 106 S. Ct. 2561 (1986).

there was no final and authoritative designation of the type and intensity of development that would be legally permitted on the property.[67] Such designation, the Court said, was an essential prerequisite to a fifth amendment regulatory taking claim.[68] Although the property owner's residential subdivision plan had been rejected by the county, the Court believed that the landowner should have submitted an application for a *different* level or type of development in order to explore the possibility that some development of the property might ultimately be permitted.

Finally, in June 1987, Chief Justice Rehnquist decided that *First English* was the proper case to conclude that regulatory takings, even if they are only temporary, require compensation. The Chief Justice was joined in his *First English* opinion by all of the *San Diego Gas & Electric* dissenters remaining on the Court—Justices Brennan, Marshall, and Powell—as well as Justices White and Scalia. *First English* sets forth the options available to a government entity whenever a court determines that a taking has been wrought by regulation. The government may (1) withdraw its invalidated regulation, (2) amend the regulation so as to avoid the taking, or (3) exercise its power of eminent domain to purchase the property for the public good.[69] Whatever option the government exercises to rid itself of the unconstitutional regulation, compensation is mandated where the regulation has wrought total deprivation of use during its period of application.

D. Implications of *First English*

The implications of the *First English* decision may be extraordinary, particularly in California where a recently reconstituted state supreme court[70] could utilize the directive of *First English* to either reverse or carefully limit a number of land-use cases denying compensation in inverse condemnation cases. The *First English* ruling represents a drastic and significant departure from the land-use and inverse condemnation rules which have operated in California since the 1979 *Agins* decision.

Between the *Agins* and *First English* decisions, when the Court's intentions regarding the compensation issue were unclear, the United States Supreme Court never indicated that it would retreat from its earlier holdings that unreasonable regulations could constitute takings in violation of the fifth amendment, nor did it indicate that monetary dam-

67. *Id.* at 2566, 2568.

68. *Id.* at 2566.

69. 107 S. Ct. 2378, 2389 (1987).

70. In November of 1986, the California voters refused to reconfirm Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin.

ages would not be constitutionally required, or would not be permitted, to compensate for a regulatory taking. Nonetheless, the California Supreme Court's *Agins* decision had represented an absolute directive against monetary compensation for regulatory takings. The impetus for the California *Agins* ruling was the fear of inhibiting the freedom of governmental agencies in the exercise of their land-use planning responsibilities. The California Supreme Court was concerned that the availability of an inverse condemnation remedy to aggrieved property owners would have a chilling effect upon the legitimate exercise of regulatory authority by local government.[71] The California Supreme Court predicted that, if compensation was an available remedy for excessive regulations, land-use policy makers would be unduly inhibited from implementing legitimate land-use goals which operate to benefit the public.[72] The California *Agins* decision assured local planning agencies that they could wield abundant leverage and power over the use and development of lands within their jurisdiction without fear of being required to compensate landowners for mistakenly overstepping constitutional restrictions on their regulatory prerogative.

Until *First English, Agins* had been staunchly followed in California.[73] The broad public policies discussed in *Agins,* seemingly very favorable to governmental authority to regulate land use without fear of monetary reprisal, have been a theme throughout the disposition of other land-use cases in the California courts.[74]

71. "Community planners must be permitted the flexibility which their work requires," otherwise their work would come to a grinding halt or deteriorate. Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979) (citing Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 120, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973)).

72. *Id.* at 277-78, 598 P.2d at 30, 157 Cal. Rptr. at 378.

73. *See, e.g.,* Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484, 494, 188 Cal. Rptr. 191, 196 (1982) ("this court is obligated to follow Agins"), *appeal dismissed.* 464 U.S. 805 (1983); Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 949, 162 Cal. Rptr. 210, 218 ("A zoning ordinance that completely destroys the value of the property can only be challenged by an action for declaratory relief or mandamus, and a plaintiff cannot recover on the theory of inverse condemnation . . . ."), *cert. denied,* 449 U.S. 901 (1980).

74. *See, e.g.,* California v. Tahoe Regional Planning Agency, 766 F.2d 1308, 1314 (9th Cir. 1985) (no project may be approved by Tahoe Regional Planning Agency—established by an interstate compact between California and Nevada—without written findings that the project's effects will not exceed the "adopted environmental threshold carrying capacity"); Pennell v. City of San Jose, 42 Cal. 3d 365, 373-74, 721 P.2d 1111, 1117-18, 228 Cal. Rptr. 726, 732-33 (1986) (upholding rent control ordinance which lists "hardship to a tenant" as one of seven factors to be considered in establishing validity of a reasonable rent increase), *cert. granted,* 107 S. Ct. 1346 (1987); Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm'n, 153 Cal. App. 3d 605, 618-19, 200 Cal. Rptr. 575, 583 (1984) (broad mandate to protect the San Francisco bay allows agency to hold landowner responsible for unauthorized

It remains to be seen whether these courts will apply *First English* to other land-use cases in California or whether its effect will be limited by its facts. For example, a broad reading of *First English* might require that local governmental agencies pay compensation for temporary regulatory takings whenever building moratoria are imposed on landowners. Likewise, growth control initiatives and ordinances could come under constitutional attack after *First English.* California courts, however, have traditionally upheld temporary measures to preserve the status quo pending the adoption of a comprehensive zoning plan or the provision of important public services.[75]. Such building moratoria have generally been upheld as a proper exercise of the state's police power. *First English,* however, suggests that the mere legitimacy of the state's interest in precluding use of land may no longer insulate governmental agencies from claims for compensation due to landowners' inability to utilize their lands on a temporary basis. If such measures were declared regulatory takings, some local planning agencies could find themselves caught in a land-use dilemma. For instance, a city might be required by state law to update its general plan[76] and to cease permitting development in the interim or to prohibit further development until the city's sewer capacity is upgraded to meet present or projected demand. At the same time, the city might be obligated, under *First English,* to compensate landowners who are temporarily deprived of all beneficial use of their property. The effect on cities and counties of such a scenario could be financially devastating. Although this policy might be fair and equitable as concerns property owners who are deprived of the use of their land, the normal

fill activities conducted by third parties despite landowner's lack of knowledge or negligence); Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App. 3d 280, 286-90, 195 Cal. Rptr. 825, 829-31 (1983) (local rent control ordinance did not constitute a taking of property).

75. *See, e.g.,* Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 596-611, 557 P.2d 473, 481-90, 135 Cal. Rptr. 41, 49-58 (1976) (upheld ordinance prohibiting issuance of residential building permits until educational, sewage disposal, and water supply facilities were upgraded); State v. Superior Court, 12 Cal. 3d 237, 252-55, 524 P.2d 1281, 1291-92, 115 Cal. Rptr. 497, 507-09 (1974) (ruling that the Coastal Zone Conservation Commission's denial of a developer's permit did not constitute compensable taking on the ground that the land might be used for public use in a plan expected to be implemented by the commission.); Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 513-15, 35 Cal. Rptr. 480, 485 (1963) (upholding an interim urgency measure designed to conserve water); Hunter v. Adams, 180 Cal. App. 2d 511, 518-24, 4 Cal. Rptr. 776, 782-84 (1960) (upholding city council resolution prohibiting issuance of building permits for projects within redevelopment area, so as to maintain status quo for at least one year).

76. CAL. GOV'T CODE § 65300 (West Supp. 1987) requires that each city and county prepare and adopt a comprehensive, long-term general plan for future physical development. All subsequent regulation must comply with these long-term general plans. *See generally* J. LONGTIN, LONGTIN'S CALIFORNIA LAND USE 171-222 (2d ed. 1987) (background discussion of general and specific plans).

functions of governmental agencies might be so inhibited that courts may be required to come to the government's rescue by limiting such a broad application of *First English.*

It is important to realize that, even after *First English,* if the state's purpose in enacting a land-use regulation is permissible, the regulation must preclude the landowner from *all* economically viable use of its land to be declared invalid and thereby give rise to a right of compensation. In *Keystone Bituminous Coal Association v. DeBenedictis,*[77] the Court emphasized that the unit of property to be examined when considering the use-deprivation issue is the entire parcel of property owned by the complaining party.[78] A landowner's inability to make any use of a specific portion of its property, therefore, is not likely to constitute a taking. In *Keystone*, petitioners urged that the segments of underground coal which would have to be left unmined in order to ensure against surface subsidence was a unit of property which was legally separate from the whole of their mining property and for which they should be compensated.[79] The Court rejected this argument, applying its analysis instead to the overall parcel of land.[80] The Court relied on its decision in *Penn Central Transportation Co. v. New York City,*[81] where it stated that " '[t]aking' jurisprudence does not divide a single parcel into discreet segments in an attempt to determine whether rights in a particular segment have been entirely abrogated."[82] Although it was estimated that twenty-seven million tons of petitioners' coal would be affected by the subject regulation, the Court in *Keystone* maintained that this particular amount of coal did not constitute a separate segment of property for takings law purposes. The Court elaborated as follows:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a set-back ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.[83]

77. 107 S. Ct. 1232 (1987) (decided three months before *First English*).
78. *Id.* at 1248-49.
79. *Id.*
80. *Id.*
81. 438 U.S. 104 (1978).
82. *Id.* at 130.
83. *Keystone*, 107 S. Ct. at 1249.

First English does not affect this segmentation of property principle, but rather speaks merely to the denial of all use of property. Following the reasoning of *Keystone,* if the interim flood protection ordinance at issue in *First English* had affected only a portion of the church's property and had permitted church use of the rest of the property, the church would not have been eligible for compensation.

First English could also apply where a governmental body has exceeded the prescribed time limits for taking final action on a project application. California Government Code sections 65920-65963.1, commonly referred to as "A.B. 884" (after its Assembly Bill designation prior to enactment), provides a statutory scheme essentially requiring governmental bodies to approve or deny a project within a period of one year after the project application is deemed to be complete,[84] with allowance for certain limited extensions of time.[85] If the project is not approved or disapproved within the applicable time periods, it is deemed to be approved by operation of law.[86] In the recent decision of *Palmer v. City of Ojai,*[87] California's Second District Court of Appeal upheld the statutory scheme enunciated in A.B. 884, concluding that the time limits enumerated in A.B. 884 are mandatory and must be followed as a matter of law.[88]

In its decision, the court disposed of the developer's prayer for more than six million dollars in damages by relying on the *Agins* rule prohibiting compensation for temporary takings.[89] The appellate court concluded that, under *Agins,* monetary damages were not available to the developer.[90] Although the affirmative adoption of a flood control ordinance which effectively deprives a landowner of all use of its property, as was the case in *First English,* is clearly different from the failure to follow mandatory time limits for acting upon a project, the consequence for the landowner is exactly the same—an inability to use its property as a result of government action which may be determined to be unauthorized. In a factual scenario similar to *First English,* it remains to be seen whether the California courts will apply *First English* to determine that a compensa-

84. CAL. GOV'T CODE § 65950 (West Supp. 1987).

85. *Id.* § 65957 (permitting a single ninety day extension upon consent of public agency and applicant).

86. CAL. GOV'T CODE § 65956(b) (West 1983) provides that "[i]n the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, such failure to act shall be deemed approval of the development project."

87. 178 Cal. App. 3d 280, 223 Cal. Rptr. 542 (1986).

88. *Id.* at 293, 223 Cal. Rptr. at 550.

89. *Id.* at 294-95, 223 Cal. Rptr. at 551.

90. *Id.*

ble temporary taking can arise under A.B. 884 if governmental bodies do not follow the statute's time limitations.

In whatever manner the California courts ultimately apply *First English,* it is indisputable that, as the *First English* dissent stated with concern, the Court's decision is sure to ignite a "litigation explosion."[91] Justice Stevens, in his dissent, opined that the long range policy implications of *First English* will be far reaching, and that much of the litigation generated by the decision will be unproductive.[92] The dissenters predicted that the *First English* decision may have a chilling effect on local planning officials, prompting them to avoid action which aggressively restricts land use for fear of litigation and the possibility of damage recovery against them.[93] Justice Stevens' dissent warns that "much important regulation will never be enacted, even perhaps in the health and safety area."[94]

The *First English* majority was not unmindful of these potential effects and stated, "[w]e realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations when enacting land-use regulations."[95] The Court explicitly stated, however, that the holding in *First English* was limited to its facts and did not address the "quite different questions that would arise in a case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like."[96] Planning process delays, therefore, may not ultimately be compensable under *First English,* but it is possible that unreasonable delays could give rise to actions for compensation under a temporary regulatory taking theory.

II. The Court's Next Step—*Nollan v. California Coastal Commission*

A. Highlights of the *Nollan* Decision

Two weeks after it decided *First English,* the Supreme Court announced its decision in *Nollan v. California Coastal Commission.*[97] The Supreme Court, by a five to four decision in *Nollan,*[98] concluded that the

91. *First English*, 107 S. Ct. at 2400 (Stevens, J., dissenting).
92. *Id.* at 2390, 2399 (Stevens, J., dissenting).
93. *Id.* at 2399 (Stevens, J., dissenting).
94. *Id.* at 2399-400 (Stevens, J., dissenting).
95. *Id.* at 2389.
96. *Id.*
97. 107 S. Ct. 3141 (1987).
98. Justice Scalia delivered the opinion of the Court, joined by Chief Justice Rehnquist

California Coastal Commission cannot require private property owners to provide public access to beaches in return for project permit approvals without strict justification.[99] Justice Brennan, who had joined the majority in *First English,* wrote a vigorous dissent in *Nollan,* stating that it was the Court, rather than the coastal commission's regulation, which had gone too far.

The Nollans had acquired an option to purchase a parcel of Ventura County coastline property upon which a small, one-story, rundown bungalow was situated.[100] The Nollans applied to the California Coastal Commission for a permit to demolish the existing structure and to replace it with a two-story, three-bedroom home, encompassing three times the square footage of the bungalow.[101] The demolition and replacement of the bungalow was a condition precedent to the Nollans' exercise of their purchase option.[102] Over the Nollans' protest, the coastal commission granted the permit subject to a requirement that the Nollans grant a lateral access easement allowing the public to pass alongside the ocean, back and forth across their beach in the area between their eight foot seawall and the historic mean high tide line (the demarcation of the property's oceanside boundary).[103] This easement would have enabled the public to use a substantial portion of the Nollans' property for access between public beaches to the north and south of the property.[104] Justice Scalia, writing for the majority, concluded that the commission had not proved the required *nexus,* or connection, between the building of the larger home on the property and the condition requiring dedication of the access easement.[105] The Court characterized the dedication requirement as a constitutionally improper appropriation of an easement for an

and Justices White, Powell, and O'Connor. Justice Brennan issued a dissenting opinion joined by Justice Marshall. Justice Blackmun wrote a separate dissent and also joined a separate dissenting opinion filed by Justice Stevens.

99. 107 S. Ct. at 3150.

100. *Id.* at 3143.

101. *Id.*

102. *Id.*

103. *Id.* The Nollans filed a challenge to the lateral access easement conditions placed on their permit, and the Ventura County Superior Court agreed with the Nollan's contention that the commission could not impose the condition unless the commission could demonstrate that the Nollan's redevelopment would adversely affect public access to the beach. The commission, however, on remand held a public hearing and issued further factual findings reaffirming its position, stating that the development "would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.' " *Id.* at 3143-44 (citation omitted).

104. *Id.* at 3143.

105. *Id.* at 3148 ("[T]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.").

otherwise legitimate governmental purpose without the payment of compensation, tantamount to an "out-and-out plan of extortion."[106]

The Court, in its reasoning, first recognized that if the Nollans had not been applying for a discretionary permit, any governmental requirement that an easement be dedicated for public use would have clearly constituted an uncompensated taking of property in violation of the fifth amendment of the United States Constitution.[107] The Court then questioned whether requiring the easement to be conveyed as a condition for issuance of a discretionary permit alters the constitutional taking analysis. The Court observed that the coastal commission did possess the authority to simply turn down the Nollans' request for a development permit, as long as such denial was based on legitimate purposes and did not preclude the Nollans from all use of their property so as to constitute a taking.[108] The Court ruled that the same legitimate purposes that could be used as bases to deny the permit application, could also be used to require an imposition of conditions upon the landowner in return for approval of the application.[109] The Court found, however, that where a condition imposed in conjunction with project approval utterly fails to directly further the goal that could have justified complete prohibition of the project, a condition requiring the dedication of an easement amounts to an uncompensated "taking."[110] Unlike the ordinance at issue in *First English,* such a condition is a taking not because the landowner is denied all use of her property, but because the condition does not *substantially advance* legitimate state interests.[111] Thus, while *First English* emphasized one prong of the two-pronged test announced by the Supreme

106. *Id.* (citation omitted).

107. *Id.* at 3145.

108. *Id.* at 3147.

109. *Id.* at 3147-48.

110. *See supra* note 105.

111. This standard has been used often by the Court in reviewing and upholding cases involving various governmental purposes and regulations. *See, e.g.,* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1242 (1987) (the legislative purposes of preserving surface land, protecting the public's health and safety and enhancing the land's taxation value were "genuine, substantial and legitimate" and the restriction of use placed upon the coal was sufficiently related to these purposes); Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (scenic zoning "substantially advance[d] legitimate governmental goals"); Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 136-38 (1978) (historic landmark preservation was a legitimate purpose which justified prohibiting the plaintiff from erecting a multi-story building on its property); United States v. Willow River Power Co., 324 U.S. 499, 509 (1945) (improvement of navigation justified the government's raising of the high-water mark which consequently reduced the plaintiff's capacity to generate electricity).

However, the Court in *Nollan* more precisely defined the substantial advancement test and gave it some teeth. The Court indicated that regulations restricting the use of property will henceforth be subject to heightened judicial scrutiny. 107 S. Ct. at 3146-47 & n.3, 3150.

Court in *Agins*—deprivation of use—*Nollan* gives new vitality to the other *Agins* prong—lack of a legitimate state interest which is substantially advanced by the regulation at issue.[112]

The *Nollan* Court analyzed the facts and determined that, while the commission's stated concerns regarding the expected detrimental effects of construction of the Nollans' new home (*e.g.*, interference with visual access to the beach and creation of a "psychological barrier" to beach access)[113] were legitimate and, presumably, could have supplied a basis for outright denial of the permit, the easement dedication requirement was not sufficiently related to such concerns and did not mitigate the problems that the coastal commission foresaw would result from the new construction.[114]

In *Nollan,* the Court found that construction of the larger home prompted permissible government concerns over visual and psychological access to the beach which might be impeded by the construction of large homes alongside the ocean.[115] The Court, however, determined that the lateral access easement along the Nollans' beachfront would, in no way, substantially advance the coastal commission's goal of providing the visual and psychological access to the beach which would be eliminated by the Nollans' new home.[116]

For a development condition to be valid under *Nollan,* it must be directly related to a detrimental aspect of the project which could have served as a legitimate basis for project denial. Once the legitimate need or burden generated by the project is established, the governmental agency can impose conditions on the development, so long as those conditions directly mitigate those detrimental effects. Therefore, the *Nollan* decision rests on the failure of the lateral access condition to directly relate to the specific public need generated by the construction of a 1,674 square foot, modern residence.

Before the Nollans constructed their beachfront residence, public access did not exist across their beachfront to the public beaches to the

112. *Agins,* 447 U.S. at 260.

113. *Nollan,* 107 S. Ct. at 3149.

114. The Court stated:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.

Id.

115. *Id.* at 3147.

116. *Id.* at 3148; *see also supra* note 111.

north and south of their property.[117] Although conceding that creation of public lateral access easements to connect the two public beaches might well be a laudable and legitimate governmental goal, the Court determined that the commission could not require the dedication of such access since the lateral easement would not mitigate impacts generated by the development project—specifically, the impairment of visual and psychological beach access.[118] Conditions such as a height or width limitations on the house or a requirement that a viewing spot be provided on the property would have been directly related to preserving the coastal viewshed for public use and would, therefore, have been upheld since the necessary nexus would be present.[119]

Curiously, the United States Supreme Court chose a case to follow *First English* that, even more than *First English* itself, involved state interests which had been considered sacrosanct. Both the California Constitution[120] and the Federal Coastal Zone Management Act[121] insure the public's access to the precious resource of the California coastline.[122] Indeed, within the tract surrounding the Nollan property, the California Coastal Commission had imposed deed restrictions requiring lateral public access along the shoreline upon all forty-three of the proposals for new shorefront development in this tract which had been approved since the commission's regulations permitted imposition of such conditions.[123] Notwithstanding the clear governmental interests in providing public access along the shoreline and preserving the California coastline, the Supreme Court chose this context to restate its policy that a burden imposed by a governmental regulation must *substantially advance* a legitimate state interest and to announce that this substantial advancement requires a direct nexus between deleterious project effects and the bur-

117. 107 S. Ct. at 3143.

118. *See supra* note 111.

119. 107 S. Ct. at 3148.

120. CAL. CONST. art. X, § 4.

121. 16 U.S.C.A. §§ 1451-1464 (West 1985 & Supp. 1987).

122. The California Constitution provides that:

> No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the rights of way to such water whenever it is required for any public purpose, . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. X, § 4.

The federal Coastal Zone Management Act provides that it is national policy "to encourage and assist the states" in providing for "public access to the coasts for recreational purposes." 16 U.S.C.A. § 1452(2)(D) (West 1985).

123. *Nollan*, 107 S. Ct. at 3144.

dens imposed on a project. If such a strict level of scrutiny applies to coastal permits, it remains to be seen how the Supreme Court and state courts will handle burdensome conditions imposed on projects that are in areas of less environmental sensitivity than the California coast.

B. California Law on Dedication Requirements Before *Nollan*

Prior to the Supreme Court's *Nollan* decision, some California courts had upheld the constitutionality of development conditions with no direct nexus to legitimate public needs generated by the proposed developments. Most recent California cases in the exaction and dedication area have relied upon two cases permitting dedication requirements as a generic quid pro quo for subdivision approval. In the oldest of these cases, *Ayres v. City Council*,[124] a subdivider was required to dedicate land for the widening of a road, even though the proposed road improvement contemplated future as well as immediate city needs, including potential future population growth, and despite the fact that the condition would benefit the city as a whole, rather than merely the subdivider's project.[125]

The other significant California exaction case carried the *Ayres* holding one step further away from the nexus requirement now mandated by *Nollan*. In *Associated Home Builders v. City of Walnut Creek*,[126] a group of developers challenged the constitutionality of state and local laws which empowered cities and counties to require the dedication of land, or payment of fees in lieu thereof, for park or recreational purposes as a condition to final subdivision map approval.[127] The California Supreme Court held that such park dedication or fee requirements were constitutional and such conditions could "be justified on the basis of a general public need for recreational facilities caused by both present and future subdivisions."[128] The court discussed the growing public need for open

124. 34 Cal. 2d 31, 207 P.2d 1 (1949).

125. The court stated: "[I]t is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole." *Id.* at 41, 207 P.2d at 7. The court ruled that the city council's refusal to approve petitioner's subdivision map unless the conditions were followed was not an exercise of the city's eminent domain power. Rather,

> It [was] the petitioner who [was] seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.

Id. at 42, 207 P.2d at 7.

126. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

127. *Id.* at 635-36, 484 P.2d at 608-09, 94 Cal. Rptr. at 632-33.

128. *Id.* at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

space in the face of California's population and development explosion. As the court explained:

> We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.[129]

In the sixteen years since the *Associated Home Builders* decision, the California Supreme Court's pronouncement has been construed by the state's lower courts to require a connection between a proposed project and the conditions imposed thereupon in some cases and not to demand any such nexus in others. California courts have typically upheld conditions and mitigation measures that are rationally based and in the general public interest.

In the same year that *Associated Home Builders* was decided, the California Legislature enacted Government Code section 65909, which expressly forbids local governmental bodies from conditioning project approvals on land dedication requirements that are not reasonably related to the use of the property.[130] Despite this legislative mandate of a policy similar to that prescribed by *Nollan,* many California planning agencies, prior to *Nollan,* went much further in exacting dedications than the provisions of this statute allow, and courts often upheld such actions.[131]

In *Liberty v. California Coastal Commission,*[132] the petitioner challenged two conditions placed upon his permit to demolish an existing structure and erect a restaurant within the jurisdiction of the commission.[133] One of these conditions required that the property owner provide one parking space for every fifty square feet of floor space in his

129. *Id.* at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.

130. Section 65909 provides, in part, as follows:

> No local governmental body, or any agency thereof, may condition the issuance of any building or use permit or zone variance on any or all of the following: (a) The dedication of land for any purpose *not reasonably related* to the use of the property for which the variance, building, or use permit is requested.

CAL. GOV'T CODE § 65909 (West 1983) (emphasis added).

131. *See, e.g.,* Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985); Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982). For discussion of *Grupe* and *Georgia-Pacific,* see *infra* notes 162-70, 154-58 and accompanying text.

132. 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).

133. *Id.* at 495-96, 170 Cal. Rptr. at 249-50.

restaurant.[134] The other contested condition required the restaurant owner to execute a deed restriction obligating him to provide free public parking in the project parking lot every day until 5:00 p.m. for a period of thirty years.[135] The Fourth District Court of Appeal discussed both *Ayres* and *Associated Home Builders* and interpreted these cases to require some nexus between project effects and dedication requirements.[136] In striking down the free public parking requirement, the *Liberty* court, much like the Supreme Court in *Nollan,* stated that unrelated conditions which merely attempt to shift the burden of providing public benefits are unreasonable exercises of the police power and are takings of private property in violation of the Constitution.[137] Operating under the premise that "the conditions imposed on the grant of land-use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use,"[138] the court ruled that the provision of parking spaces for restaurant use was a valid requirement, but that the coastal commission could not force the property owner to provide free public parking for individuals lured to the area by other activities and businesses.[139]

The Second District Court of Appeal has also required that dedication conditions be justified by needs or burdens created by the proposed project. In *Building Industry Association of Southern California v. City of Oxnard,*[140] the court of appeal held that an exaction of a fee equal to 2.8% of the building valuation of any new development may indeed help to ameliorate growth-related problems, but that the fee operated unfairly and without regard to the actual needs generated by individual building projects.[141]

In a later Second District Court of Appeal case, *Remmenga v. California Coastal Commission,*[142] the petitioners applied to the commission for permission to construct a single family dwelling on their lot in the

134. *Id.* at 495, 170 Cal. Rptr. at 249-50.

135. *Id.*

136. *Id.* at 500-01, 170 Cal. Rptr. at 252-53.

137. *Id.* at 502, 170 Cal. Rptr. at 254.

138. *Id.* at 503, 170 Cal. Rptr. at 254-55 (citing Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 421, 79 Cal. Rptr. 872, 879 (1969)).

139. *Id.* at 504, 170 Cal. Rptr. at 255.

140. 150 Cal. App. 3d 535, 198 Cal. Rptr. 63, 65-66 (1984), *vacated,* 40 Cal. 3d 1, 706 P.2d 285, 218 Cal. Rptr. 672 (1985) (remanded for reconsideration in light of an amendment to the city ordinance).

141. *Id.* at 538, 198 Cal. Rptr. at 65-66.

142. 163 Cal. App. 3d 623, 209 Cal. Rptr. 628, *appeal dismissed,* 474 U.S. 915, *reh'g denied,* 474 U.S. 1027 (1985).

Hollister Ranch subdivision in Santa Barbara County.[143] Although the subdivision itself partially fronted the Pacific Ocean, the petitioners' lot was located more than a mile from the coast.[144] Pursuant to state law, the coastal commission granted the building permit subject to the payment of a $5,000 in-lieu public access fee by the property owners.[145] The court applied a rational relationship test[146] to determine whether the condition bore a relationship to the burden imposed on the public by the project. In finding that the necessary nexus existed, the court stated:

> In the present case, the Legislature had ample basis upon which to conclude that construction of the proposed improvement between the first public road and the coast, in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access.[147]

Even though the *Remmenga* court found a sufficient relationship between the project and the conditions imposed thereon, it is not clear whether the *Remmenga* decision would satisfy the requirements of *Nollan,* particularly because a good bit of the majority opinion in *Remmenga* reads like Justice Brennan's *Nollan dissent.*[148] Since the property in

143. *Id.* at 626, 209 Cal. Rptr. at 629-30.

144. *Id.*

145. *Id.* The measure requiring this fee was an urgency measure adopted in 1982 in which the California Legislature determined that

> (a) the Legislature hereby finds and declares that a dispute exists at the Hollister Ranch in Santa Barbara County with respect to the implementation of public access policies of this division and that it is in the interest of the State and the property owners at the Hollister Ranch to resolve this dispute in an expeditious manner. The Legislature further finds and declares that public access should be provided in a timely manner and that in order to achieve this goal, while permitting property owners to commence construction, the provisions of this section are necessary to promote the public's welfare . . . .

Id. (citing CAL. PUB. RES. CODE § 30610.8 (West 1987)).

146. *Id.* at 630, 209 Cal. Rptr. at 632. The test was defined by the court as follows:

> If as a condition to receipt of a permit, the applicant must donate property for a public use that bears no relationship to the benefit conferred on the applicant or the burden imposed on the public, there is a taking of property without payment of just compensation in violation of the United States Constitution. . . . Conversely, if there is such a rational relationship, the requirement of dedication of property or payment of money in lieu thereof is a validly imposed condition.

Id. at 627, 209 Cal. Rptr. at 630 (citations omitted).

147. *Id.* at 630, 209 Cal. Rptr. at 632.

148. Both decisions discussed the important policy favoring public access to the coast and noted that the policy retains its validity and vitality because of its express recognition in the California Constitution. *Nollan,* 107 S. Ct. at 3153 (Brennan, J., dissenting) (citing CAL. CONST. art. X, § 4.); *Remmenga,* 163 Cal. App. 3d at 630, 209 Cal. Rptr. at 632 (same). Additionally, like the majority in *Remmenga*, Justice Brennan in *Nollan* expressed his view that the condition imposed was rationally and reasonably related to the goal of providing public access to the beach. *Nollan,* 107 S. Ct. at 3160-61.

Remmenga was located over a mile from the ocean, it would be difficult, after *Nollan,* for the coastal commission to persuade a court that the construction of a house on such property would generate a need for public beach access and that such need could be the legitimate basis for denial of the building permit application. Although the rational relationship test set forth in *Remmenga* may have been properly formulated so as to satisfy the dictates of *Nollan,*[149] it is unlikely that the manner in which the *Remmenga* court applied that legal standard to the facts

149. The *Nollan* Court did not enunciate precisely what standard should henceforth be used to judge whether there exists a sufficient nexus between the burdens arising from a project and the conditions imposed thereon. Rather, the Court, "for purposes of discussion," accepted the coastal commission's proposed test that a condition is valid if "it is reasonably related to the public need or burden that the [project] creates or to which it contributes." The Court, however, overturned the condition since it did not meet "even the most untailored standards." 107 S. Ct. at 3148.

While California courts were using a reasonable relation test to determine the legitimacy of conditions, (*e.g.,* Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 183, 212 Cal. Rptr. 578, 601 (1985); Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 701, 183 Cal. Rptr. 395, 409 (1982)), courts in other jurisdictions developed other standards. A minority of jurisdictions have applied a "specifically and uniquely attributable" test, which requires that the need for fee and dedication restrictions imposed upon a developer be specifically and uniquely attributable to the developer's project. *See, e.g.,* Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961); Frank Ansuini Inc. v. City of Cranston, 107 R.I. 63, 69, 264 A.2d 910, 913 (1970).

Another widely used and acclaimed standard, the stringency of which falls between the reasonable relationship test and the specifically and uniquely attributable test, is the rational nexus standard. *See e.g.,* Parks v. Watson, 716 F.2d 646, 652-53 (9th Cir. 1983) (a condition imposed by a governmental agency must be rationally related to the benefit conferred upon the developer by that agency; rational nexus test is preferable to standards on either extreme); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320 (Fla. 1976) (fees which do not exceed a pro rata share of reasonably anticipated costs of improvements are permissible where the improvements are reasonably required and use of the fees collected is limited to meeting the costs of improvements), *cert. denied,* 444 U.S. 867 (1979); Home Builders & Contractors Ass'n v. Board of Palm Beach County Comm'rs, 446 So. 2d 140, 143-44 (Fla. Dist. Ct. App. 1983) (impact fees must not exceed the cost of improvements required by the new development, and the improvements must adequately benefit the development that is the source of the fee); Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 865-67 (Fla. Dist. Ct. App. 1976) (rejecting both *Ayres'* reasonably related test as an insufficient restraint on government and the *Pioneer Trust* "specifically and uniquely attributable" test as unduly restrictive, and adopting instead the rational nexus approach), *cert. denied,* 348 So. 2d 955 (1977). *See generally* Juergensmeyer & Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma,* 9 FLA. ST. U.L. REV. 415, 430-33 (1981) (discussing appropriate standards for determining constitutionality of impact fees).

Although the Supreme Court in *Nollan* did not delineate which particular standard is most appropriate, the Court's decision strongly implies that a mere reasonable relation between a project and conditions imposed upon it will be insufficient. Many courts throughout the country are likely to agree with the Florida courts that an extremely tight nexus test is too unwieldy for widespread use. It is likely that, in the wake of *Nollan* and absent further Supreme Court direction, the rational nexus test will be relied upon more heavily by courts and governmental agencies.

would fulfill the heightened scrutiny envisioned by the United States Supreme Court in *Nollan.*[150]

Numerous other California cases have relied on *Ayres* and *Associated Home Builders* to uphold the validity of development conditions that were not clearly necessitated by project effects. For instance, in *Frisco Land & Mining Co. v. State,*[151] the First District Court of Appeal upheld several development conditions imposed upon a subdivider[152] on the grounds that "a regulatory body may require a dedication of property in the interest of the general welfare as a condition of permitting the subdivision of lands."[153]

Other cases decided by the First District Court of Appeal are dramatic evidence of the relative freedom that governmental agencies were able to exercise with regard to development conditions prior to *Nollan.* Project permit conditions requiring dedication of easements providing public access to the shoreline were once again the subject of attack in *Georgia-Pacific Corporation v. California Coastal Commission.*[154] These dedication conditions were imposed upon Georgia-Pacific when it applied for permits to erect a fence around its property and to build a helicopter pad, hangar, parking lot, and various other facilities on the shoreline property where it operated a lumber processing facility.[155] The court upheld most of the access dedication requirements[156] without even considering whether the new construction would contribute to a need for public beach access.[157] The court reasoned that:

> A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permit-

150. *See infra* notes 180-81 and accompanying text.

151. 74 Cal. App. 3d 736, 754, 141 Cal. Rptr. 820, 830 (1977), *cert. denied,* 436 U.S. 918 (1978).

152. A regional commission decided that a permit to construct single family dwellings would be granted if the landowners provided erosion control and beach access. *Id.* at 749-50, 141 Cal. Rptr. at 828. Another condition required landowners to maintain common areas and to make necessary repairs of the common areas damaged by landslides, soil creep, sloughing, slumping, gullying or erosion. *Id.* at 750-51, 141 Cal. Rptr. at 828-29.

153. *Id.* at 753, 141 Cal. Rptr. at 830.

154. 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982).

155. *Id.* at 683-86, 183 Cal. Rptr. at 397-400.

156. The court found that some of the imposed access easements were an abuse of the commission's discretion since they had been imposed on the basis of speculation that Georgia-Pacific might, in the future, change its land use so as to make further dedication of easements feasible. *Id.* at 700, 183 Cal. Rptr. at 408. The court, however, held that there was no evidence to support this notion and that the pertinent section of the California Coastal Act, CAL. PUB. RES. CODE § 30212 (1979) (amended 1983), does not authorize the commission to impose access conditions on the basis of speculation. *Georgia-Pacific,* 132 Cal. App. 3d at 700, 183 Cal. Rptr. at 408.

157. *Id.* at 699, 183 Cal. Rptr. at 407-08.

> ting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it. The "scope and extent" of the easements required by the Commission were "reasonably related" to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people of this state. Their relationship to the "nature and impact" of the proposed projects was not a valid basis for the trial court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights.[158]

Plainly, the *Georgia-Pacific* court concluded that, in order to be valid, conditions needed only to benefit the general welfare and did not have to be necessitated by the particular project bearing the burden of the conditions. Indeed, in *Norsco Enterprises v. City of Fremont,*[159] a condition that an applicant pay "in-lieu" park fees in conjunction with the tentative subdivision map approval for conversion of existing apartment units into condominium units was upheld, despite the fact that no physical change was planned for the residential complex and there would be no influx of new residents generated by the condominium conversion.[160] Nevertheless, these California courts could have relied on Government Code section 65912, which declares that open-space zoning ordinances may not "take or damage private property for public use" without just compensation,[161] to find governmental actions such as those in *Norsco* unconstitutional. Yet, they often chose to uphold the validity of park dedication or in-lieu fee requirements. It would seem that application of

158. *Id.* (citations omitted). The California Coastal Act provides the following legislative findings: "The Legislature . . . finds and declares that the basic goals of the state for the coastal zone are to: . . . (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources, conservation principles and constitutionally protected rights of private property owners." CAL. PUB. RES. CODE § 30001.5(c) (West 1986).

159. 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976).

160. *Id.* at 498, 126 Cal. Rptr. at 665. The court upheld the "in-lieu" park fees on three separate grounds: (1) that *Associated Home Builders* made it clear that a municipality can require fees even though there will be no new residents; (2) that statutes providing for the acquisition and maintenance of open space lands must be upheld whenever possible; and (3) that Norsco Enterprises had not suffered a denial of equal protection, even though the fee was charged to condominium developers and not to developers of apartment complexes. This classification was deemed rational and not arbitrary. *Id.* at 495-98, 126 Cal. Rptr. at 662-65.

161. Section 65912 provides:

> The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.

CAL. GOV'T CODE § 65912 (West 1983).

the *Nollan* nexus analysis to these cases would leave their holdings suspect.

For example, the facts of *Grupe v. California Coastal Commission*[162] were strikingly similar to the facts before the Court in *Nollan.* Moreover, *Grupe* formed much of the basis for the Second District Court of Appeal's decision to support the lateral public access easement imposed upon the Nollans.[163] The subject property in *Grupe* was, like that in *Nollan,* a beachfront residential lot located in an enclave of homes between two public beaches.[164] The California Coastal Commission had granted Grupe a permit to build a single family home on his lot subject to the dedication of a lateral public access easement along the ocean.[165] The court in *Grupe* engaged in a lengthy discussion concerning the proper standard for testing the general validity of all exactions. The court agreed with the property owner that a particular exaction must be related to needs to which the development contributes.[166] The court, however, went on to point out that *Ayres* and *Associated Home Builders* had allowed "consideration of future needs and potential population growth in formulating the conditions imposed upon the subdivider."[167] The court relied on the California Supreme Court's statement that conditions "can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions."[168] The *Grupe* court concluded that the appropriate standard required that "there need be only an indirect relationship between an exaction and a need to which the project contributes."[169] The court held that the dedication requirement was properly designed to meet needs to which the project contributed, at least in an incidental manner, since Grupe's home would be "one more brick in the wall" separating the public from the ocean.[170] In the wake of *Nollan, Grupe* would probably be decided differently if brought before a California court today.

162. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

163. Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28, *review denied,* 177 Cal. 3d 719 (1986), *rev'd,* 107 S. Ct. 3141 (1987).

164. *Grupe,* 166 Cal. App. 3d at 155, 212 Cal. Rptr. at 581.

165. *Id.* at 157, 212 Cal. Rptr. at 582.

166. *Id.* at 163-64, 212 Cal. Rptr. at 586-88. The court stated, however, that "there is no additional requirement that the exaction directly or indirectly benefit the development" as the respondent had maintained. *Id.* at 164, 212 Cal. Rptr. at 587.

167. *Id.* at 165, 212 Cal. Rptr. at 588.

168. *Id.* (citing Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610-11, 94 Cal. Rptr. 630, 634-35 (1971)).

169. *Id.*

170. *Id.* at 167, 212 Cal. Rptr. at 589-90.

C. Implications of *Nollan*

The implications of the *Nollan* case, like *First English,* will undoubtedly be far reaching. In fact, the practical application and significance of *Nollan* may prove to be even greater than that of *First English.*

Supreme Court Justice Stevens, in his *Nollan* dissent, expressed grave concern regarding the combined effects of *First English* and *Nollan.* Justice Stevens maintained that the *Nollan* case evidences the uncertainty surrounding the Court's takings jurisprudence and demonstrates how easily public officials can, in good faith, "disagree about the validity of specific types of land-use regulation."[171] Justice Stevens is fearful of the interaction between these two significant land-use cases because, although the extent to which governmental agencies are empowered to regulate land use is rather uncertain, *First English* forces local governments to pay for mistakes made in the land-use regulation arena.[172] Stevens predicts a chilling effect on the enactment of land-use regulations and, in all likelihood, his prediction will prove accurate. He posits that, as a result of *First English* and *Nollan,* planning authorities will "be left guessing about how the Court will react to the next case, and the one after that."[173]

It is possible that planners and governmental officials may not be seriously affected in their efforts to exact conditions from developers if they are careful, thoughtful, and attentive to detail at all crucial steps in the establishment of the required nexus. As Justice Brennan noted in his lengthy *Nollan* dissent, governmental agencies, to avoid claims of unconstitutional takings, must now use their expertise to demonstrate a specific and logical connection between burdens produced by new development and conditions designed to alleviate such burdens.[174] Undoubtedly, most future litigation concerning the legitimacy of development conditions will focus on the formal findings made by the governmental agency when it takes action upon a project. Agencies will have to finely tune and clearly document their findings in order for the nexus conclusions to withstand careful scrutiny.

Justice Scalia suggests that careful attention to the findings, although important, may not be enough to prevent a taking. He comments:

> We do not share Justice Brennan's confidence that the Commission "should have little difficulty in the future in utilizing its expertise

171. *Nollan,* 107 S. Ct. at 3163 (Stevens, J., dissenting).
172. *Id.* (Stevens, J., dissenting).
173. *Id.* at 3164 (Stevens, J., dissenting).
174. *Id.* at 3161 (Stevens, J., dissenting).

> to demonstrate a specific connection between provisions for access and burdens on access," that will avoid the effect of today's decision. We view the fifth amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the objective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.[175]

What Justice Scalia is saying to Justice Brennan and to governmental bodies throughout the country is that mere attention to findings will simply not be enough to legitimate an otherwise inappropriate exercise of the police power requiring a landowner to dedicate property in a manner which is not reasonably related to the burdens or needs arising from the landowner's project.

Indeed, Justice Scalia goes on to suggest that the scrutiny the Court will utilize in reviewing land-use decisions is more than the traditional, rational basis approach, which Justice Brennan, in his dissenting opinion, forcefully notes has been the Court's standard of review in takings cases.[176] Traditionally, exercises of the police power were deemed to be constitutionally legitimate if they were rationally related to proper governmental objectives.[177] Justice Scalia, in the *Nollan* majority opinion, disagrees with this standard. He implies that the Court, in the future, will more carefully scrutinize governmental conditions,[178] particularly

175. *Id.* at 3150 (emphasis in original) (citations omitted).

176. *Id.* at 3151 (Brennan, J., dissenting) ("It is also by now commonplace that this Court's review of the rationality of a state's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective.") (emphasis in original).

177. *See, e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); *see also Nollan,* 107 S. Ct. at 3151 n.1 (Brennan, J., dissenting).

178. Justice Scalia begins his discussion of the applicable standard by stating:

> We have long recognized that land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," . . . Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

Nollan, 107 S. Ct. at 3146-47 (citation omitted). Scalia then proceeded to elaborate on the proper standard for determining whether a regulation substantially advances legitimate state interests. The majority disagreed with Justice Brennan's characterization of the appropriate standard as a deferential one which merely seeks to ensure rationality among decision-makers, stating that "[c]ontrary to Justice Brennan's claim, . . . [w]e have required that the regulation

where they require a landowner to provide property for the use of the public.[179]

This analysis is reminiscent of the strict judicial scrutiny doctrine developed by the Warren Court in its application of the equal protection clause to strike down governmental regulations and laws which were racially suspect[180] or which imposed limitations on a citizen's ability to vote.[181] In fact, Justice Scalia refers to the equal protection clause in the footnotes of his majority opinion. He comments in footnote four:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the state's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[182]

Justice Scalia may be indicating that, in an appropriate case, the Court might apply the equal protection clause to strike down otherwise reasonable conditions which single out particular private property owners to provide public benefits. The Court could apply this form of special heightened judicial scrutiny where fundamental interests, such as property rights, are being impaired. For example, because of limitations on the public fisc in recent years, particularly in California, governmental bodies have imposed rigorous conditions on new developments which effectively contribute the "last drop in the bucket" with regard to traffic or related constraints. Frequently, developers of new residential developments have been required to provide an entirely new road or other major circulation improvements due to traffic constraints caused primarily by other, earlier developments. Justice Scalia, in *Nollan,* may be suggesting

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'substantially advance' the 'legitimate state interest' sought to be achieved, not that 'the State *could rationally have decided'* the measure adopted might achieve the State's objective." *Id.* at 3147 n.3 (citations omitted).

179. *Id.* at 3150.

180. *See, e.g.,* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject . . . [the restrictions] to the most rigid scrutiny.").

181. *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). "We conclude that a state violates [equal protection] whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. "[C]lassification which might invade or restrain . . . [equal protection rights and liberties] must be closely scrutinized and carefully confined." *Id.* at 670; *see also* Note, *Development in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969) (analyzing the Supreme Court's scope of review in the equal protection area).

182. *Nollan,* 107 S. Ct. at 3147 n.4 (citations omitted).

that the imposition of such a hurdle on the developer might be an unfair and unconstitutional denial of equal protection.

After *Nollan,* many questions remain about the legitimacy of various types of exactions and linkage programs which have been freely utilized by governmental planning agencies and which, until *Nollan,* have been presumed valid. Naturally, requirements to dedicate land for such purposes as park and recreational use or public access to beaches will be strictly scrutinized by developers and their representatives, as will in-lieu fees for the provision of such services in a location other than the project site. Under *Nollan,* such dedication and fee requirements will remain valid as long as they are necessitated by development of the project and their need could be a basis for complete prohibition of the project. The same concepts hold true for traffic mitigation fees, provision of day-care services by developers of office space and requirements that commercial developers contribute toward affordable housing development funds. Planning authorities, however, may be obligated to clearly justify their method in determining the amount of fees or extent of services to be provided by the developer. Governmental agencies may be forced to employ experts to document the validity of fee schedules imposed upon developers.

For example, consider San Francisco's program of using office development fees to help finance low- and moderate-income housing within the city.[183] Presently, developers of office space are assessed a fee of $5.34 per square foot of office space over fifty thousand square feet.[184]

183. SAN FRANCISCO, CAL., MUN. PLANNING CODE art. III, § 313 (1987) (Housing Requirements for Office Development Projects). The code finds that "[t]here is a low vacancy rate for housing affordable to persons of low and moderate income" which is "due in part to large office developments which have attracted and will continue to attract additional employees and residents to the City." *Id.* The program requires that developers of 50,000 or more gross square feet of office space either pay an in-lieu fee to the city or construct housing units (net addition of gross square feet of office space multiplied by .000386 equals the number of housing units to be provided), 62% of which must be affordable to households of low and moderate income for 20 years. *Id.*

184. *Id.* § 313(b). This subsection of San Francisco's Planning Code justifies the fee by stating that

> [t]he required housing exaction shall be based upon formulae derived in the report entitled "The Economic Basis for an Office Housing Production Program in San Francisco," prepared by Recht, Hausrath & Associates, dated July 19, 1984. The aforesaid report concludes that the cost to provide affordable housing to persons attracted to large office developments in the C-3 District is $9.47 to $10.47 per square foot. However, in recognition of the numerous assumptions which were made in the report and hence the potential inexactitude of the final calculation, the City has selected the conservative figure of $5.34 per square foot as the cost for purposes of this ordinance.

Id.

As *Nollan* works its way into the development process, San Francisco office developers may challenge the city to demonstrate how their particular developments will contribute to a need for low- and moderate-income housing. This could only be argued on the basis that future employees of such office space will earn low and moderate incomes, will not already live within San Francisco, and will desire to live within the city. No one denies the need for such affordable housing; rather, *Nollan* calls into question the legal propriety of shifting the burden of the cost of the public benefit to the "last guy on the block" with a perceived deep pocket.

Similar challenges are likely to arise concerning levies against development projects for the purpose of funding the construction or reconstruction of school facilities under recently enacted California legislation.[185] The school impact fee program permits school boards to assess fees of up to $1.50 per square foot on new residential development and twenty-five cents per square foot on new commercial or industrial development.[186] Cities and counties are prohibited from issuing permits to developers who cannot present evidence of compliance with the applicable school district's requirements.[187] The California Government Code specifies that no fees may be levied against commercial or industrial development unless the governing board of the school district has made a finding that the amount of fees to be paid is needed for community school facilities and is reasonably related and limited to the need for schools caused by the commercial or industrial development.[188] Generally, a school district enacts such a finding to apply to all future development within the school district. *Nollan* supplies commercial and industrial developers with a potential basis for challenging the imposition of school district fees, absent clear evidence of a direct nexus between commercial or industrial developments and the increased need for school facilities. School districts may argue that an expansion of employment opportunities brings new residents into an area and impacts the need for school facilities. Developers might counter this argument by maintaining that, if residential development within the school district is assessed a fee, then any increase in residents will result in an accompanying increase in state school funds. Thus, they may argue, assessment of commercial and industrial development is a form of double taxation. This recently enacted school construction financing scheme is likely to be tested in the near

185. CAL. GOV'T CODE § 53080 (West Supp. 1987).
186. *Id.* § 65995(b)(1), (2).
187. *Id.* § 53080(b).
188. *Id.* § 65995(b)(2).

future and it will be interesting to observe how courts will apply *Nollan* to the resolution of this issue.

Nollan raises additional concerns in other areas of environmental law in which the California Legislature has issued broad directives to state agencies. For example, in *Nollan* itself, the Supreme Court circumscribed the heretofore relatively unchecked power of the California Coastal Commission to carry out its duties without compensating landowners for infringement upon and deprivation of property wrought by the commission. The California Legislature had bestowed upon the commission a broad mandate to protect the state's coastal zone, enhancing and restoring its quality, conserving its resources, and maximizing its availability to the public.[189] The United States Supreme Court has now clarified that, although these goals are laudable and should be pursued, where they deprive landowners of the use of their property absent a direct nexus between project benefits and burdens, they must be pursued through eminent domain.

There are several other areas of the law in which the California Legislature has directed governmental agencies to pursue, with sweeping directives, broadly stated environmental goals. One of these environmental areas, which also significantly impacts the planning and development process, concerns the California Environmental Quality Act of 1975 (CEQA).[190]

CEQA mandates that all potentially significant environmental effects of a proposed project be studied and evaluated prior to the project's approval.[191] Under CEQA, governmental agencies must consider all relevant environmental assessments prior to approving a project and must make good faith efforts to mitigate potential environmental effects of a project through appropriate development conditions.[192] As long as mitigating conditions imposed upon development through the CEQA process are truly necessitated by burdens expected to be generated by the proposed development (*i.e.*, public burdens which support project denial), and the need for such conditions is established by the environmental as-

189. *See* California Coastal Act, CAL. PUB. RES. CODE §§ 30001-30900 (West 1983 & Supp. 1987).

190. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1987). Guidelines for the implementation of CEQA are contained in CAL. ADMIN. CODE tit. XIV, §§ 15000-15387 (1983).

191. CAL. PUB. RES. CODE §§ 21082.2, 21083, 21100, 21151 (West 1986); CAL. ADMIN. CODE tit. XIV, §§ 15064, 15065, 15126 (1983).

192. *See* CAL. PUB. RES. CODE § 21080; CAL. ADMIN. CODE tit. XIV, §§ 15074, 15091, 15093, 15096 (1983).

sessment document,[193] conditions imposed to mitigate potential environmental detriment will be sufficiently related to satisfy the *Nollan* nexus test. CEQA, however, is also frequently used as a political tool by individuals who are opposed to a proposed project. If the environmental assessment process is so misused as to require development conditions that are not actually designed to mitigate environmental impacts, but instead are political compromises reached between planning authorities and project opponents, developers may be able to use *Nollan* to challenge such conditions as unrelated to the studied environmental effects of the proposed project.

Similarly, in other areas where both Congress and the state legislature have directed governmental agencies to take severe and affirmative action to ensure environmental quality, such as air, water, and soil quality, the government may now be forced to compensate landowners whenever conditions relative to these areas are imposed upon development projects which do not contribute to deterioration of environmental quality. For example, a landowner may be required to remove toxic substances from its soil in return for permission to build upon the land, even when construction of the project would not aggravate the hazardous waste problem and would not expose persons or property to dangerous conditions.

Nollan also raises questions concerning how cumulative impact concerns can be mitigated through individual development conditions. Under CEQA, a governmental agency is obligated to consider all cumulative effects of proposed and anticipated developments, in conjunction with the effects of the instant development proposal, and to assess how these cumulative impacts will affect the environment.[194] Often, mitigating conditions imposed upon a project are designed to alleviate all or

193. The project-reviewing agency conducts an initial study to determine whether "the project may have a significant effect on the environment." CAL. ADMIN. CODE tit. XIV, § 15063(a) (1983). If following this study "there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial," the governmental agency must prepare an environmental impact report (EIR) or use a prior EIR that adequately analyzes the instant project. *Id.* § 15063(b)(l). An EIR is an informational document (often lengthy and technical) that evaluates the significant environmental effects of a project, identifies ways to minimize these effects, and describes reasonable alternatives to the project. *Id.* § 15121. If the agency determines that there is no substantial evidence that the project may significantly affect the environment, or if the applicant acquiesces to project modifications or conditions which will alleviate otherwise adverse impacts of the project, the reviewing agency must prepare a negative declaration. *Id.* § 15063(b)(2)(c). A negative declaration states "that the project will not have a significant effect on the environment" and lists any mitigation measures designed to avoid significant effects. *Id.* § 15071.

194. *Id.* §§ 15126(e), 15130; *see also id.* § 15355 (defining cumulative impacts).

some of the cumulative impact of a project, rather than to address merely the impacts of the individual project alone. The *Nollan* decision leaves open several questions concerning the manner in which cumulative impacts will be addressed in the future. If *Nollan* limits the nexus consideration to the connection between the individual proposed project and the condition designed to alleviate the adverse effects thereof, governmental agencies must be quite careful in utilizing cumulative impacts when designing development conditions. On the one hand, CEQA requires the mitigation of significant environmental impacts which, in fact, are primarily cumulative in nature; on the other hand, *Nollan* requires restraint in designing mitigation measures that do not extend beyond the specific needs generated by the individual project.

It is important to note, however, that the Supreme Court recognized that the coastal commission could deny the Nollans' permit application (or impose a related condition) *if* the construction of their new house "alone or by reason of the cumulative impact produced in conjunction with other construction" would substantially impede permissible governmental purposes.[195] The Court's statement indicates that it would uphold consideration of cumulative impacts as part of the nexus formula, particularly with regard to permissible reasons for project denial. The Court couches this statement in footnote six, however, indicating that a taking would occur if the Nollans were singled out to bear the burden of remedying problems of a cumulative nature.[196] Therefore, it appears that cumulative impacts enter into the computation of a project's detrimental effects, so long as that project is not, as a result, burdened with conditions to a significantly greater degree than other impact-generating projects. Alternatively, governmental bodies may feel compelled to deny approval of projects rather than risk litigation challenging overly burdensome conditions.

Of course, it will be up to the courts to ultimately determine how specific and individualized the nexus between development burdens and development conditions must be. The ensuing period of uncertainty will be perhaps one of the most challenging in the area of land-use planning since the Supreme Court's landmark zoning decision over sixty years ago in *Village of Euclid v. Ambler Realty.*[197]

195. *Nollan,* 107 S. Ct. at 3147.

196. *Id.* at 3147 n.4.

197. 272 U.S. 365 (1926). In this case, the Supreme Court blessed zoning laws for the first time, holding that a zoning ordinance that prohibited industrial development in an area zoned for residential purposes was a valid exercise of the city's police power and, therefore, did not constitutionally harm the landowner. *Id.* at 397. The Court concluded that the zoning ordi-

Conclusion

Although the precise effects of *First English* and *Nollan* on land-use law and practice in California are difficult to predict at this point since the Court has left several significant issues unresolved, it is clear that the long-range implications of these cases will be extremely far reaching. With the anticipated replacement of retiring Justice Powell with a potentially more conservative Supreme Court Justice, it remains to be seen whether *First English* and *Nollan* are merely the first of many steps to be taken by the Supreme Court to erode the prerogative of local governmental agencies in the land-use area and to strengthen the position of private property owners. Conversely, the Supreme Court may have merely wished to clarify its jurisprudential thinking on these two particular points and the Court's agenda concerning land-use regulation may end here. Land-use planners, developers, municipal officials and environmental groups throughout the country anxiously await further directives from the Supreme Court and state courts to determine precisely how much the rules of the game have changed. One thing is certain—the Court's decisions in *First English* and *Nollan* have raised the stakes.

nance was reasonable and not arbitrary because it protected the public health, safety, and morals and promoted the general welfare. *Id.* at 395.